

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

29227

FILE: B-215421**DATE:** September 4, 1984**MATTER OF:** Support Systems Associates, Inc.**DIGEST:**

1. Protest that NASA was required to select protester's offer, which was determined within the competitive range, for final negotiations is denied. Procurement was conducted under NASA procurement procedures under which "discussions" with offerors in the competitive range are limited essentially to proposal clarification, after which a contract is "negotiated" with a selected offeror, that is, price and terms are finalized. GAO has recognized this approach as meeting the requirement at 10 U.S.C. § 2304(g) (1982) for written or oral discussions in negotiated procurements. Here, discussions were conducted with both offerors in the competitive range and competing offeror was properly selected for final negotiations on the basis of a technically superior proposal.
2. Protest against NASA negotiated procurement procedures stated in RFP is untimely under section 21.2(b)(1) of our Bid Protest Procedures, since it was filed after the closing date for receipt of initial proposals.
3. Allegation that the proposed awardee lacks integrity constitutes a protest against an affirmative determination of responsibility, which must be made by the contracting official prior to an award. Our Office will not review this determination in the absence of a showing of fraud or bad faith on the part of the contracting officer or a failure to apply definitive criteria of responsibility and neither exception applies here.

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Support Systems Associates, Inc. (SSAI), protests the proposed award of a cost-plus-fixed-fee contract to Analex Corporation (Analex) for space flight systems technical support services under request for proposal (RFP) No. 3-508014Q, issued by Lewis Research Center, National Aeronautics and Space Administration (NASA). SSAI contends that although NASA determined that SSAI was in the competitive range, NASA failed to conduct discussions with SSAI as required by NASA procurement regulations. SSAI asserts that since the technical proposals allegedly were determined essentially equal, award should be made to the lowest cost offeror, which is SSAI. Finally, SSAI contends Analex should be rejected as a nonresponsible firm because of alleged lack of integrity relating to the predecessor NASA contract.

We dismiss the protest in part and deny it in part.

The RFP was issued on January 27, 1984, and Analex and SSAI submitted proposals. The RFP advised offerors that proposals would be evaluated in accordance with the NASA Source Evaluation Handbook. The factors for evaluations were mission suitability (technical factors), experience and past performance, cost, and other factors. The mission suitability factors were further defined as understanding and approach of sample tasks, key personnel, overall program organization and management control and corporate or company resources. Technical proposals were scored and ranked. The other listed factors were considered in determining the competitive range and in selecting Analex for negotiations.

The RFP stated that the contractor (or contractors) selected for final negotiation would be the one considered best able to perform the contract in a manner most advantageous to the government all factors considered. (Emphasis added.) Also, the RFP advised that in accordance with NASA Procurement Regulation § 3-804-3(b)(5), written and oral discussions could be conducted with all proposers determined in the competitive range; however, any discussions would be limited to ambiguities and uncertainties, if any, and would not include a discussion of any deficiencies.

Based on initial evaluations, NASA's Source Evaluation Board (SEB) scored Analex's proposal significantly higher than SSAI's proposal; however, both proposals were determined to fall within the competitive range. Written discussions by an exchange of letters which included questions from NASA concerning both technical and cost aspects of the

offers took place between April 17, 1984, and April 26, 1984. Additionally, oral discussions, the results of which were later confirmed by letter, were conducted with SSAI on May 3, 1984. NASA evaluators determined no oral discussions with Analex were necessary. After the SEB reevaluated and rescored the proposals based on these discussions, the relative ranking of the two firms did not change.

Independent of the technical evaluation, a business management committee (BMC) evaluated the cost proposals and the experience and past performance of the two offerors. The BMC found that the costs proposed by both firms were reasonable with the cost of Analex being higher than SSAI's. Based upon an analysis of the proposals, the BMC developed its own cost realism ("should-cost" study) to determine as accurately as possible what it would most likely cost the government to contract with either firm. As a result of this analysis, the difference in cost between the two proposals decreased with Analex's probable cost remaining slightly higher.

Based on these findings, the Source Selection Official (SSO) concluded that Analex's proposal was technically superior because it contained meaningful advantages in its approach to technical, managerial and program support matters and that these advantages adequately justified the slight difference in probable cost. Accordingly, the SSO selected Analex for final negotiations.

NASA has made no award under this RFP pending resolution of this protest and the completion of an investigation of SSAI's allegation that Analex is nonresponsible based on alleged improper conduct in obtaining the award of the predecessor NASA contract.

SSAI protests the negotiation procedures followed by NASA, particularly the nature and extent of the "discussions" conducted. SSAI argues that NASA could not exclude an offeror in the competitive range from final negotiations and asserts it was denied an opportunity to improve its cost and technical proposals. Specifically, SSAI asserts that NASA improperly and prejudicially adjusted SSAI's cost proposal in NASA's cost realism study without discussion of these adjustments with SSAI. These adjustments decreased the cost advantage of SSAI's proposal.

SSAI's contention appears to be based on a misunderstanding of NASA's approach to discussions and negotiations as contemplated by NASA's regulations. We have recognized the NASA procurement procedures followed in this case, whereby "discussions" are limited essentially to clarification of proposals, after which a contract is "negotiated" with the selected offeror, as one legitimate approach to meeting the requirement of 10 U.S.C. § 2304(g) (1982) for written or oral discussions in negotiated procurements. See Program Resources, Inc., B-192964, Apr. 23, 1979, 79-1 C.P.D. ¶ 281, and cases cited therein. Thus, the procedure followed here in selecting Analox for final negotiations after written and oral discussions was proper, and NASA was not required to conduct final "negotiations" with SSAI on either its technical or cost proposal.

To the extent SSAI is objecting to NASA's procurement procedures which were stated in the RFP, the protest is untimely under section 21.2(b)(1) of our Bid Protest Procedures, since it was filed after the March 13, 1984, closing date for receipt of initial proposals. See Program Resources, Inc., B-192964, supra.

Furthermore, the record shows that, consistent with NASA procedures as stated in the RFP, NASA submitted questions to SSAI both in writing and orally which sought clarification of both technical and cost aspects of SSAI's proposal. We note that Analox was selected for final negotiations on the basis of its technically superior proposal, notwithstanding its higher cost. There is nothing in the record to indicate that NASA's decision to negotiate with Analox would have been different if NASA had accepted SSAI's unadjusted cost as realistic. The SEB rated Analox's technical proposal significantly better in three out of four mission suitability factors and equal on the fourth factor. Analox's overall score was 346 points (out of a possible, 1,000 points) higher than SSAI's. Based on unadjusted cost, Analox's proposed cost was 10 percent higher than SSAI's. Under these circumstances, we cannot say that NASA's determination to conduct final negotiations with Analox was unreasonable or would have been affected by further discussion of SSAI's cost proposal. See Program Resources, Inc., B-192964, supra.

Finally, SSAI argues that Analox should be found nonresponsible on the basis of lack of integrity. NASA advises us that no award has been made to date and that NASA's Inspector General's Office, in conjunction with the

Department of Justice, currently is investigating the allegations raised by SSAI. NASA states that it intends to make a responsibility determination upon evaluation of the investigation findings. In any event, SSAI's allegation is a matter relating to Analex's responsibility which must be determined in the affirmative by the contracting officer prior to award. International Alliance of Sports Officials, B-211831, Mar. 6, 1984, 84-1 C.P.D. ¶ 271. Our Office does not review protests against affirmative determinations of responsibility, unless either possible fraud on the part of the procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Harnischfeger Corporation, B-211313, July 8, 1983, 83-2 C.P.D. ¶ 68. Since neither of the exceptions applies in this case, we dismiss this protest issue.

for Shilton J. Dorlan
Comptroller General
of the United States